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IN THE

SUPREME COURT OF THE UNITED STATES

No. 289

FIRST AMERICAN INSURANCE COMPANY,
Petitioner,

vs.

JOHN P. O'CONNOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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No. _____

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, FIRST AMERICAN INSURANCE COMPANY, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on April 18, 1968.

OPINION BELOW

The Opinion of the court below (Appendix A) is reported in 392 F.2d 588.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 18, 1968. (Ap-

pendix B) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

WHETHER FULL FAITH AND CREDIT REQUIRES ENFORCEMENT OF AN ILLINOIS JUDGMENT WHERE THE DEFENDANT IS DENIED DUE PROCESS OF LAW IN THE ILLINOIS PROCEEDING.

2.

WHETHER FULL FAITH AND CREDIT REQUIRES A FEDERAL COURT SITTING IN FLORIDA TO ENFORCE A JUDGMENT OF AN ILLINOIS COURT WHICH WOULD NOT BE ACCORDED FULL FAITH AND CREDIT BY THE STATE COURTS OF FLORIDA.

STATUTE INVOLVED

The Constitutional provisions involved are U.S. Const. Art.IV, §1, U.S.Const. Amends. V and XIV, §1.

The statutory provision involved is 28 U.S.C. §1738 (Appendix C).

STATEMENT

Plaintiff below filed his Complaint in the United States District Court, Southern District of Florida, seeking to enforce a money judgment of the Circuit Court of

Cook County, Illinois, against an insured of defendant's predecessor corporation. (R. 1-4) The jurisdiction of the district court was invoked because of diversity of citizenship, the plaintiff being a citizen of Illinois, and the defendant corporation being a Florida corporation with its principal place of business in Florida.

The agreed issue arose from plaintiff's claim against defendant, as successor to Public National Insurance Company, for an unsatisfied Illinois judgment. The Illinois proceedings involved personal injuries allegedly sustained by plaintiff as the proximate result of the negligence of Public National's insured. There was no question as to coverage.

Defendant's sole contention below was that the Illinois judgment was not entitled to full faith and credit in the United States District Court for the Southern District of Florida for the reason that defendant's insured was denied due process of law in the Illinois proceedings. (R. 34-35)

The original Complaint for damages was filed in the Circuit Court of Cook County, Illinois, on July 19, 1957, each defendant entering a general appearance. (R. 41) An Amended Complaint and Answer to Amended Complaint were filed in February and April, 1958. (R. 9)

On January 21, 1964, defendant's counsel sent notice to all parties of a hearing on counsel's Motion to Withdraw to be held on January 23, 1964. This notice was sent to the insured *in California* and to the insurer *in Florida.* Two days later, January 23, 1964, the court entered its order allowing the attorney to withdraw.

One day later, January 24, 1964, plaintiff filed a Second Amended Complaint with permission of court, and *trial on the merits was held*—both acts accomplished without notice to the insured or the insurer. (Plaintiff's Exhibit No. 1)

In the absence of the defendant, who was not in default, the jury returned verdicts for plaintiff and his wife totaling $2,000. Plaintiff filed a Motion for New Trial on the issue of damages only. The original court file contains nothing to indicate that notice of this motion was given to any interested party. (Plaintiff's Exhibit No. 1)

The Motion for New Trial was heard, again in the absence of defendants or counsel, and a new trial was granted. The second trial of the cause was held without notice to the insured or insurer, or their presence. (Plaintiff's Exhibit No. 1) The second trial resulted in a judgment of $15,000. Thirteen months later, new counsel for defendant, filed a motion to vacate this judgment, which was denied. No appeal was taken from this order. (R. 41, Plaintiff's Exhibit No. 3)

Plaintiff thereafter came into the United States District Court for the Southern District of Florida to enforce the $15,000 judgment of the Illinois Court.

The cause was submitted for final judgment without jury based upon the pleadings, Order on Pre-Trial Hearing and evidence adduced at hearing. (R. 40) The District Court determined that the full faith and credit requirement of the United States Constitution (U.S.Const. Art. IV, §1) required enforcement of the Illinois judgment

(R. 42); and Final Judgment for plaintiff was, accordingly, rendered. (R. 43-44) An appeal was taken from this judgment to the United States Court of Appeals for the Fifth Circuit. (R. 44-45) By Opinion and Judgment (Appendix A, Appendix B), that Court affirmed the judgment of the District Court based upon the authority of *Midessa Television Co., Inc. v. Motion Pictures for Television, Inc.*, 290 F.2d 203 (5th Cir.1961)[1]; which cites a "general rule" that full faith and credit requires enforcement of the judgment of a state court unless it is shown that the judgment was entered without jurisdiction. The "general rule" cited is subject to important limitations as is hereinafter set forth, and the case is inapplicable in any event in that defendant had proper notice of proceedings, but voluntarily chose not to appear and present a defense.

REASONS FOR GRANTING THE WRIT

1. This case presents a substantial question under the Full Faith and Credit Clause (Art.IV, §1) of the Constitution. Whatever has been the determination of the state court in Illinois, the Federal District Court or the Circuit Court of Appeals, this Court "is the final arbiter of questions arising under the Full Faith and Credit Clause." *Morris v. Jones*, 329 U.S. 545, 552, 91 L.Ed. 488 67 S.Ct. 451 (1947).

2. The decision of the court below in the instant case is directly in conflict with the decision of this Court in *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876). In *Windsor*, this Court determined that a judgment en-

[1]For convenience, the opinion in the *Midessa Television Co.* case is printed as Appendix D to this Petition.

tered without an opportunity to be heard is void, outside the jurisdiction of the court, and a denial of judicial due process. Furthermore, jurisdiction is the right to hear *and* determine, not to determine without an opportunity to be heard. Where there is no opportunity to be heard, there can be no exercise of jurisdiction.

The Illinois judgment in the instant case was entered without adequate notice of hearing on counsel's motion to withdraw, without notice of trial, without notice of hearing on motions, without notice of subsequent trial, and with absolutely no opportunity afforded to appear and defend. It was error to accord such a judgment full faith and credit in a Federal court where that judgment patently violated the right to appear and defend. (It is to be noted that the proceedings in Illinois were also in derogation of defendants' rights under the rules of practice of Illinois, R. 11)

> "The law is, and always has been that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case, of the right to appear, is in legal effect the recall of the citation to him." *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914, 916 (1876).

The fact that in *Windsor v. McVeigh*, supra, the right of defendant to appear and defend was actually prohibited by order of the court, while here the right to appear and defend was constructively prohibited by a complete lack of notice, is wholly immaterial to the basic issue involved.

The Court below based its judgment solely on a de-

termination that the judgment of the Circuit Court of Cook County, Illinois, was not subject to collateral attack because that court had jurisdiction over the parties and subject matter, citing *Midessa Television Co., Inc. v. Motion Pictures For Television, Inc.*, 290 F.2d 203 (5th Cir. 1961). While the *Midessa Television* case states the general proposition that full faith and credit requires a Federal court to enforce the judgment of a state court unless it is shown that the judgment was entered without jurisdiction, it does so under circumstances which nullify its effect here. The court there specifically noted that the defendant had legal notice of hearing, and, nevertheless, voluntarily chose not to assert defenses. Further, under the pronouncement in *Windsor v. McVeigh*, the judgment here *was* entered without jurisdiction, and full faith and credit does not require its enforcement even under the *Midessa* rule.

Any effort to stretch the general rule set forth in the above-cited case to justify enforcement of the Illinois judgment here collides with the clarion words of this Court in *Windsor v. McVeigh*, supra, at page 917:

> "The doctrine . . . that, where a court has once acquired jurisdiction . . . its judgment, however erroneous, cannot be collaterally assailed, is, undoubtedly correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application. * * * Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by the law."

The fact that long subsequent to trial, counsel did appear for defendant and attempt to set aside the judgment, and that no appeal was taken from the denial, does not clothe with propriety a judgment entered in excess of the court's jurisdiction. The Full Faith and Credit Clause did not prohibit review of either the denial or the judgment, and the district court erroneously held otherwise.

3. Clearly, resolution of the question presented is of utmost importance in clarifying the relationship between the Full Faith and Credit Clause and the constitutional guaranty of due process contained in the Fifth and Fourteenth Amendments to the Constitution, and calls for the exercise of this Court's power of supervision.

A judgment entered without notice of proceedings, depriving a party of an opportunity to be heard (as here), is a denial of judicial due process, even though the court had previously acquired jurisdiction over the person and property of the defendant. *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876). Furthermore, a judgment obtained in violation of due process is not entitled to full faith and credit because the requirement of full faith and credit was never intended to modify the constitutional provision guaranteeing due process. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 56 L.Ed. 1009, 32 S.Ct. 641 (1912); *Griffin v. Griffin*, 327 U.S. 220, 90 L.Ed. 635, 66 S.Ct. 556 (1946); *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958).

As is so aptly stated in the dissent to *Morris v. Jones*, 329 U.S. 545, 558, 91 L.Ed. 488, 67 S.Ct. 451 (1947), the Full Faith and Credit Clause "does not embody an ab-

solutist conception of mechanical applicability. As is so often true of constitutional problems, an accommodation must be struck between different provisions of the Constitution."

To refuse to review proceedings of a state court solely because jurisdiction had once been obtained over a defendant's person, even though there has been no reasonable opportunity to appear and defend, ostensibly because of the Full Faith and Credit Clause, is an "absolutist conception of mechanical applicability." *Morris v. Jones*, supra.

4. Application of the Full Faith and Credit Clause to enforce a judgment of a state court entered in the absence of jurisdiction and due process of the law departs from yet another settled principle of judicial proceeding. Where jurisdiction in a Federal District Court is founded on diversity of citizenship, as here, that court will apply the conflict of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020 (1941). The conflicts law of the State of Florida refuses full faith and credit to judicial acts of sister states which are repugnant to the laws or policy of Florida. *Mott v. First Nat'l Bank*, 98 Fla. 444, 124 So. 36.

It is the very essence of due process in Florida that fair notice and a reasonable opportunity to be heard shall be given interested parties before judgment is rendered. *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; *Tibbets v. Olson*, 91 Fla. 824, 108 So. 679; *Ryan's Furniture Exch., Inc. v. McNair*, 120 Fla. 109, 162 So. 483; *Mayflower Inv. Co. v. Brill*, 137 Fla. 287, 188 So.

205; *Western Union Tel. Co. v. Suit*, 153 Fla. 490, 15 So.2d 33; *Reichert v. Appel*, Fla. 1954, 74 So.2d 674.

Under the facts set forth above, the Illinois judgment would not be accorded full faith and credit in the courts of Florida, and, consequently, should not be accorded full faith and credit by a Federal court sitting in Florida.

CONCLUSION

As a prerequisite to application of the full faith and credit doctrine, the trial judge below determined that he was not at liberty to review the Illinois order refusing to vacate the previously rendered judgment. (R. 57) The district judge was not required to do so in order to refuse to enforce this judgment in the State of Florida. What an Illinois court says about the validity of its own judgment in the State of Illinois can have no effect on whether such judgment is entitled to be enforced by a Federal court sitting in Florida. Furthermore, that the Circuit Court of Cook County, Illinois, originally had jurisdiction over the parties and subject matter before it does not require application of the full faith and credit doctrine to a patently invalid judgment entered without jurisdiction.

Where the judgment of a state court is rendered in the absence of due process, regardless of jurisdiction over person or property, no constitutional provision requires or permits enforcement by another tribunal. The finding of the trial judge here to the contrary was error.

The insured or defendant's predecessor having been denied his inherent right to be heard, the judgment subsequently rendered could not be enforced in a Federal Dis-

trict Court. For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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